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SERIAL NUMBER	FILING DATE	FIRST NAMED APPLICANT	ATTORNEY DOCKET NO.
08/135,046	10/12/93	GARVIN	R

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CRANE, EXAMINER	
ART UNIT	PAPER NUMBER
3201	

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Please find below a communication from the EXAMINER in charge of this application.

Commissioner of Patents

Office Action Summary

Application No.
08/135,046

Applicant(s)
Garvin

Examiner
Daniel Crane

Group Art Unit
3201



☒ Responsive to communication(s) filed on Nov 13, 1995

☐ This action is **FINAL**.

☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

A shortened statutory period for response to this action is set to expire THREE month(s), or thirty days, whichever is longer, from the mailing date of this communication. Failure to respond within the period for response will cause the application to become abandoned. (35 U.S.C. § 133). Extensions of time may be obtained under the provisions of 37 CFR 1.136(a).

Disposition of Claims

☒ Claim(s) 1-6 and 9 is/are pending in the application.

Of the above, claim(s) _____ is/are withdrawn from consideration.

☐ Claim(s) _____ is/are allowed.

☒ Claim(s) 1-6 and 9 is/are rejected.

☐ Claim(s) _____ is/are objected to.

☐ Claims _____ are subject to restriction or election requirement.

Application Papers

☐ See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.

☐ The drawing(s) filed on _____ is/are objected to by the Examiner.

☐ The proposed drawing correction, filed on _____ is ☐ approved ☐ disapproved.

☐ The specification is objected to by the Examiner.

☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119

☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).

☐ All ☐ Some* ☐ None of the CERTIFIED copies of the priority documents have been
☐ received.

☐ received in Application No. (Series Code/Serial Number) _____

☐ received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

*Certified copies not received: _____

☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

Attachment(s)

☒ Notice of References Cited, PTO-892

☐ Information Disclosure Statement(s), PTO-1449, Paper No(s). _____

☐ Interview Summary, PTO-413

☐ Notice of Draftsperson's Patent Drawing Review, PTO-948

☐ Notice of Informal Patent Application, PTO-152

--- SEE OFFICE ACTION ON THE FOLLOWING PAGES ---

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RECONSIDERATION

New prior art has come to the examiner's attention and in light thereof, the following action is herein made of record.

STATUTE CITATION

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

REJECTION OF CLAIMS OVER PRIOR ART

Claims 1-6 and 9 rejected under 35 U.S.C. § 103 as being unpatentable over **Eggenmuller** (3,687,061) in view of **Taylor** (4,230,676). The claimed method and apparatus is substantially shown by Eggenmuller in Figure 10, for example, where a bag 49 is positioned on the filling machine comprising tube holder 51 and boundary wall 8 so that the filled bag 49 is provided with a ventilating conduit 54. Several ventilating pipes can be provided and positioned over the entire length of the mass of material (see column 7, lines 61-65, of Eggenmuller). Eggenmuller does not indicate that the conduits are perforated. However, the use of perforated conduits in the ventilating of material masses is common in the art as evidenced by Taylor. It would have been obvious at the time the invention was made to a person of ordinary skill in the art to have modified Eggenmuller's method and apparatus by modifying the conduit 54 by

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providing the conduit with multiply perforations as evidenced by Taylor so as to improve the ventilating characteristics of the conduit and fully aerate the material mass of the bag. Since it is common in the grain drying art to "force" air within the contained grain to prevent spoilage of the grain, it would have been obvious to have connected the ventilating conduit 54 to a forced air source.

Claims 1-6 and 9 are rejected under 35 U.S.C. § 103 as being unpatentable over **Cullen** (5,426,910). Cullen's claimed invention is directed to the same claimed invention in that treatment of bagged contents is accomplished by a bag filling machine where a perforated conduit is fed through the bag filling machine as the bag is filled and deployed from the bag filling machine. Although the conflicting claims are not identical, they are not patentably distinct from each other because (1) the method claimed by applicants is an obvious method of treating bagged contents in the operation of the patented bagging machine and (2) the apparatus claimed by applicants is an obvious simplification of the patented bagging machine. Since the claims are considered obvious method procedures used by the claimed apparatus and broadened apparatus constructions of the claimed Cullen invention, an affidavit swearing behind the reference (as submitted by applicants) cannot be used to overcome the

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reference. Specifically, it is maintained that the skilled artisan in this art would have recognized that a "pipe support" (Claim 1, last paragraph, of the Cullen (5,426,910) reference) could have been dispensed with so as to permit manual support of the pipe during its feeding and positioning within the filled bag. It is also noted herein, that this "pipe support", even though not claimed by applicant, is somewhat of an inherent provision in either the method or apparatus because "support" for the pipe would necessarily be required during the operation of the apparatus. This is the case whether the pipe is "supported" while on a reel or simply supported in its elongated form.

RESPONSE TO APPLICANTS' COMMENTS

Applicant has responded to the rejection of the claims over Cullen under 35 USC § 103 by correlating the issues addressed in the decision decided by the CAFC in *General Food v. Studiengelfellschaft Kohle MbH*, 23 USPQ 2d 1839, to those issues under consideration under review herein. In its broadest aspect, similarity between the noted decision and the issues herein may exist. In this regard, the above decision considered two patents with the difference between the patents being that one patent claimed an additional step in the method claim as compared to the method claim of the other patent. The question was whether double patenting existed between the two patents even though the

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claims between the two patents are identical with the exception of one patent having an additional step. It was decided that no double patenting was present and that the two claims were distinct.

While this decision may, on the face, dovetail with the present situation concerning the double patenting holding between the Cullen claims and the claims of the present case, this is clearly not the case. Simply deleting one feature of one claim as opposed to another claim does not necessarily result in the two claims being distinct from one another. This is the intent in *General Food v. Studiengelfellschaft Kohle Mbh*, 23 USPQ 2d 1839, where

"If the rejected claim defines more than an obvious variation, it is patentably distinct". (underlining added)

Accordingly, the first consideration must be to ascertain whether the difference between the claims is an obvious variation. Once this has been determined, the concern as to double patenting can be dispensed with or applied.

It is the examiner's position that the claims in the application omit a provision which is determined to be an obvious variation to the content and gist of the claims set out in the Cullen reference, applied above. The examiner's holding is based upon the level of skill of the artisan within this field and further based upon the position that dispensing with a conduit

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support would have been obvious so as to hand manipulate the conduit during the material bagging procedure. Clearly, the skilled artisan is cognizant of the well recognized procedure of dispensing with an implement for doing the same maneuvers that can be accomplished by hand.

The issues developed and considered in previous pending cases before the Patent & Trademark Office are not germane to the issues at hand.

Applicant further points to the decision of *Aelonly v. Arni*, 192 USPQ 486, cited also by the examiner in the previous Office Action, to bolster his position that the applicability of Cullen against the claims is improper. However, this decision follows directly with the previously noted decision, *General Food v. Studiengelfellschaft Kohle Mbh*, 23 USPQ 2d 1839, where the consideration must be made as to whether an "obvious variation" exists between compared claims to determine double patenting or equivalents. Again, the examiner has determined that applicant's claimed invention is substantially the same as that claimed by Cullen to the extent that an obvious variation between the two embodiments persists.

In view of the new ground of rejection, claims rejected over Eggenmuller and Taylor under 35 USC § 103, this Office Action is not made final since applicant's response of November 13, 1995 did not necessitate the new ground of rejection.

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PRIOR ART CITED BY EXAMINER

Sugiura (4,666,854) has been cited to show the art of forcing air/liquid through a perforated conduit which has been embedded in a mass of material.

INQUIRIES

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Examiner D. Crane whose telephone number is **(703) 308-1870**. The examiner's supervisor, Mr. J. Sipos, can be reached at **(703) 308-1882**.

Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is **(703) 308-1148**.

Documents related to the instant application may be submitted directly to Group 3200 by facsimile transmission at all times. Applicant(s) is(are) reminded to clearly mark any transmission as "DRAFT" if it is not to be considered as an official response. The Group 3200 Facsimile Center number is **(703) 305-3579**.

DCCrane (20W)
January 11, 1996



Daniel C. Crane
Primary Patent Examiner
Group Art Unit 3201